

HIGH COURT OF UTTARANCHAL, AT NAINITAL

Criminal Writ Petition No.1198 of 2007

{Old No.21531 of 1991}

M/s Bansal Industries
Village Danpur, Tehsil Kichha
District Nainital through its
Proprietor Baboo Lal Bansal ...Petitioner
Versus

1. IInd Addl. Sessions Judge, Nainital
2. Sub-Divisional Magistrate
Kichha at Rudrapur Respondents

Mr. M. C. Pandey, Advocate for the petitioner.
Mr. Nandan Arya, A.G.A. for the State.

Hon'ble J. C. S. Rawat, J.

Mr. M. C. Pandey, Advocate for the petitioner.

Mr. Nandan Arya, A.G.A. for the State.

This writ petition has been filed by the petitioner for the following reliefs:-

- (i) Issue a suitable writ order or direction in the nature of certiorari quashing the impugned order dated 21.06.1991 passed by the 2nd Addl. Sessions Judge, Nainital (Annexure-10 to the petition).
- (ii) issue a suitable writ order or direction quashing the impugned order dated 30.01.1991 confirming the preliminary order as well as the preliminary order dated

31.12.1990 passed by the SDM, Rudrapur (Nainital) in Criminal Case No.11/9 of 190 Pradhan Goan Sabha Vs. Bansal Rice Mill, or to pass such other suitable order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case.

- (iii) Issue any other suitable writ order or direction in favour of the petitioner and against the respondents to which the petitioner is found entitled in law.
- (iv) Award costs of this case to the petitioner.

3. A complaint was filed before the S.D.M., Rudrapur by Gambhir Singh, Gram Pradhan, Danpur alleging therein that a rice mill of the petitioner was installed at village Danpur and it was located at a distance of about 3-4 kms from the Abadi of village Danpur. It was further alleged in the complaint that the rice mill of petitioner causes pollution in the area. The said complaint is annexed at Annexure-3 to the petition.

4. Thereafter, a notice was sent to the petitioner by the S.D.M. to appear before the Court on 25.12.1990. Copy of order of the Magistrate is annexed at Annexure-4 to the petition. Original notice of the record reveals that it was

28.12.1990 and the date in original record has been changed by handwriting and a number "5" has been substituted in place of number '8'. 25th December 1990 was a Holiday.

5. On 28.12.1990 the petitioner has filed an objection before the Court which is Annexure-5 to the petition. Trial court's record reveals that on 28.12.1990 the statements of two witnesses, namely Ram Prasad Singh and Gambhir Singh were recorded. Thereafter, a conditional order was passed under section 133 Cr.P.C. on 31.12.1990 (copy of which is annexed as Annexure-6 to the petition), by which the petitioner was directed to appear on 07.01.1990.

6. It is pertinent to mention here that perusal of trial court's record reveals that the Magistrate has not maintained any ordersheet from the date when the application was filed till 07.01.1991. It is not revealed from the ordersheet as to whether the petitioner was present on 28.01.1990 or not, there is no order of the magistrate on the ordersheet to proceed with the case in absence of petitioner. There is no mention of the dates on which he was called upon to reply before the court either on 28th or 25th. Perusal of order annexed at Annexure-7 of the petition also reveals that on 28.12.1990 the petitioner was directed

to appear on 25.01.1991 though the order was passed before the said date. The S.D.M. has not maintained the ordersheets and in absence of the ordersheet, the correct facts could not be ascertained. Thereafter, the impugned order was made absolute on 30.01.1991. No procedure as laid down under section 138 Cr.P.C. has been followed even after issuing preliminary order. It has been held in the case of **C. A. Avarachan Versus C. V. Sreenivasan & another 1996 SCC (Cri) 174** that the omission on the part of the Sub-Divisional Magistrate to draw up a preliminary order, which is a sine-quo-non for initiating proceedings under Section 133 Cr.P.C. and without following the procedure provided for by Section 138 Cr.P.C., its order is unsustainable and is vitiated. In the instant case, since the S.D.M. has not maintained proper ordersheet and it could not be ascertained as to whether the said orders were passed pursuant to his orders/directions or the version, which has been placed by the petitioner, is correct. The procedure laid down under the Cr.P.C. has not been followed by the Magistrate.

7. In view of the foregoing discussion, the impugned orders dated 21.06.1991 passed by the 2nd Addl. Sessions Judge, Nainital and order dated 30.01.1991 passed by the S.D.M., Rudrapur are liable to be quashed. Therefore, the impugned orders are hereby quashed. However, it is

directed that the learned Magistrate will proceed afresh in the matter and dispose it of expeditiously by following proper procedure of law provided under Chapter X Cr.P.C. and after considering the objections raised by the parties.

(J. C. S. Rawat, J.)

Dated 27.03.2009

LSR

